

96F422
L. 556
CAAT (A)

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

GEORGE BROWN COLLEGE

(hereinafter referred to as the "College")

and

ONTARIO PUBLIC SERVICE EMPLOYEES' UNION
(FOR ACADEMIC EMPLOYEES)

(hereinafter referred to as the "Union")

Grievance of S. Lesch

BEFORE:

- M. G. Mitchnick - Chairman
- R. Gallivan - College Nominee
- S. Nicholson - Union Nominee

APPEARANCES:

For the College

- C. Zabek
- A. Lilepold

For the Union

- G. Richards
- S. Lesch

Hearing held in Toronto on May 14th, 1997

INTERIM AWARD

This grievance, filed on behalf of Shirley Lesch, challenges:

- 1) the manner in which the College has calculated the grievor's seniority, and
- 2) the manner in which the College has applied the "bumping rights" under Article 27.06 in the case of the grievor.

The parties have agreed to have the board determine point number one, the calculation of seniority issue, first.

The grievor began her employment with the College as a Teaching Master back in 1972. She continued teaching full-time at the College until 1984. At that point the grievor began a family, and, in the absence of a sufficiently flexible teaching schedule that would fit around day-care, she elected to resign her position. Although teaching off and on a part-time or sessional basis from that point on, the grievor did not rejoin the College as a full-time faculty member until 1993. The collective agreement for some time has had a provision for an employee taking a break in employment to apply upon re-employment to receive credit for their prior service, and in the 1991-94 collective agreement the maximum length of a period for this provision normally to apply was extended from two to six years. Thus Article 21.06 in the 1991-94 collective agreement had come to provide as follows:

21.06 If a full-time employee terminates employment for the purpose of caring for a dependent person (or persons) and is subsequently re-employed as a full-time employee, the employee shall, upon application and

completion of the probationary period, be credited with the employee's previous length of service for the purpose of:

- (i) vesting of Cumulative Sick Leave Gratuity (provided no previous payment was made);
- (ii) the Severance Pay Plan;
- (iii) Professional Development Leave;
- (iv) College Prepaid Leave Plan, and
- (v) **seniority.**

provided that

- (i) the employee had completed at least two years continuous service at the time of termination;
- (ii) the employee's termination indicated the reason for leaving to be the caring for a dependent person;
- (iii) **the break in service was for no longer than six years, except as may be mutually agreed between the College and the employee.**

(emphasis added)

That provision, obviously, has been incorporated by the parties into their collective agreement to accommodate persons in situations of the nature of the grievor's. Two points must be noted, however. The first is that, in recognition of the competing interests of other employees working at the College continuously, there is a limit of six years' break on the entitlement of an individual, as of right, to retrieve his or her previous seniority credit. That express limitation can only be extended upon mutual agreement between the employee and the College, and thus becomes the exception rather than the rule. The second point is that even within the six years the collective

agreement does not place any obligation on the College to afford such credit to an employee "automatically". Rather, an individual must make application, or ask, for the seniority adjustment to be made (or, in the case of an individual like the grievor whose time off has been greater than six years, for the College to consider the question of granting an exception). There is no dispute that the grievor in fact made no request to have her prior seniority credited at the point that she re-joined the College's full-time faculty in 1993. Nor was the matter raised by the grievor in the next ensuing teaching year, 1994, nor the next, in 1995. The grievor was simply glad to be back teaching, and gave no thought to the question of her specific seniority standing, until there came a point where it mattered. That point came in February of 1996, when the grievor, along with dozens of others, was served with notice of lay-off. It is the position of the grievor that it is now not too late for the application of Article 21.06 to her situation, and that she ought to be granted by the board the prior period of seniority credit that the Article contemplates. Alternatively, the grievor submits that the board ought to direct the College to now turn its mind to the grievor's application, and to provide compelling reasons if the decision in fact is to turn down the grievor's request.

While a question of prior seniority credit tends typically to be raised at the time of an individual's return to full-time employment, it is true, as counsel for the Union notes, that Article 21.06 contains no express time limit for applying for

such retroactive seniority credit. The collective agreement, however, must be read as a whole. Seniority Lists involve relationships between the College and the full complement of its teaching faculty, and between the members of that faculty one to another between themselves. This collective agreement accordingly is very specific in that regard, in bringing "closure" to the issue of the correctness of the posted Seniority List, within a very short time period after that List has been posted. Article 27.04 A and B stipulate in that regard:

27.04 A In January of each year, the College shall prepare and post lists as follows:

- (i) a seniority list of all regular full-time employees showing the employee's name, classification, division or department, and seniority as determined pursuant to this Article.
- (ii) a list of all probationary employees showing the employee's name, division or department, date of hire, and date of completion of the probationary period.
- (iii) a seniority list of all partial-load employees employed since the previous January showing the employee's name, division or department, and accumulated service to date.

Such lists shall also be sent to the Union Local President.

27.04 B Such lists shall be posted for at least two weeks and the information contained therein shall be considered correct for all purposes unless the employee disputes its accuracy within such two week period by filing written notice thereof with the College.

Those provisions on their face appear to be mandatory ones, against which no relief is provided, and that that is the case has been affirmed at arbitration by boards that have been called upon to consider the matter: see Mohawk College, decision of

H.D. Brown released March 3, 1978; Fanshawe College (Dobos), decision of K. Swan released November 26th, 1991. There is one exception to that absolute "closure" principle, and that is set out in subparagraph (c) to Article 27.04:

27.04 C If an error is established subsequent to the period referred to in 27.04 B, the correction shall not render the College liable in any manner for actions based thereon.

As can be seen, however, for that section to apply it must be shown that the College in compiling the Seniority List has made an "error" in representing the List as it has; otherwise, all employees are entitled to take the matter of the propriety of their standing on that Seniority List as closed, and to rely on that. And the key point here, once again, is that the crediting of a prior period of service for an individual who has returned to full-time employment is not, as the collective agreement has been written, automatic. It arises only as a result of "application" for it by the individual who is returning. And here, that application cannot even be said to be a matter of pure "form", with the requested adjustment then flowing as a matter of right. The parties have written into the collective agreement a general rule as to how long an individual can be off in order to be entitled to the credit as a matter of right, and the length of the grievor's absence took her outside that rule. In the case of the grievor the College would have to be asked to consider such a request, and the College would then have to come to a conclusion to grant the request in the grievor's favour. Neither such a request nor such a decision in favour of the grievor had ever


been made at the time the Seniority Lists now called into question were posted, and on a plain reading of the language it is simply not possible to say that the Seniority Lists as they had been compiled by the College contained any "error".

In sum, the board, on a reading of the collective agreement as a whole, does not find that by virtue of Article 21.06 the College has the unilateral right, as effectively submitted here, to choose at the point of a lay-off to favour one employee's interests versus another or others', on the question of the employees' relative seniority rankings. Rather, the effect of Article 27.04 of the collective agreement is that an employee's rights under Article 21.06 must ultimately be pursued with the College within the two weeks allowed for "challenging" any Seniority List that has been posted following the employee's return to the bargaining unit. Otherwise, all employees in the unit are entitled to rely on "closure" of that Seniority List question, in the terms on which it was posted, and the College is required to proceed on that basis. The first aspect of the present grievance, that seeking to now achieve an adjustment in the grievor's seniority date, must accordingly be dismissed.

Dated this ^{for} 17 day of ^{June} ~~May~~, 1997

I concur/dissent

I concur/dissent


M. G. Mitchnick

"R. Gallivan"
R. Gallivan

"S. Nicholson"
S. Nicholson

IN THE MATTER OF AN ARBITRATION

BETWEEN:

GEORGE BROWN COLLEGE

the Employer,

-and-

O.P.S.E.U.

the Union.

AND IN THE MATTER OF THE GRIEVANCE OF SHIRLEY LESCH - #96F422

DISSENT

Having read the decision of the majority, I must dissent from it.

The two points which are clearly described in the award as the pivotal aspects of the case, are obviously crucial to the resolution of this matter.

On the second point, that of the need for an individual to make application to the College to consider "an exception to the rule" under 21.06(iii), the College ought to have considered Ms. Lesch's grievance as embodying the necessary application. It is the only logical conclusion one could draw from the issues raised in the grievance.

Then, once the application has been deemed to have been made, the first point discussed in the award can be examined. That point is whether the employee and the College can come to a "mutual agreement" to credit the pre-absence seniority of the employee. In the case before us there is no evidence that the Employer ever put their mind to the matter; thus a finding that they had not exercised their discretion in a reasonable fashion is obvious.

Based on the above analysis of these preliminary matters, I would have found against the College on the first question which was before us: i.e., I would have found the College did not meet its obligations in Article 21.06 in calculating Ms. Lesch's seniority.

Having found that, the parties would then have been able to progress to the issue of correct application of bumping rights, either settling the matter on their own or bringing their dispute back to their Board.

All of which is respectfully submitted.

Dated at Toronto, Ontario this 19th Day of June, 1997.

A handwritten signature in cursive script, appearing to read "S. Nicholson", written over a horizontal line.

Sandra Nicholson, Union Nominee